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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-898

THE UNITED STATES OF AMERICA for the use of PAUL POTTER, dba RFI SHIELD-ROOMS,

Petitioner

v

CHRISTENSEN & FOSTER, a corporation, FEDERAL INSURANCE COMPANY, a corporation,

Respondents

PETITION FOR WRIT OF CERTIORARI

Paul Potter, Petitioner

P.O. Box 260

Menlo Park, California

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Coast Bank v Holmes (1971) 19 C.A. 3d 581 — 10

Norris v Chevrolet Motor Div. (1974) 39 C.A. 917 — 10

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

THE UNITED STATES OF AMERICA for the use of PAUL POTTER, dba RFI SHIELD-ROOMS,

Petitioner

v

CHRISTENSEN & FOSTER, a corporation, FEDERAL INSURANCE COMPANY, a corporation,

Respondents

The petitioner, Paul Potter, dba RFI Shield-Rooms, respectfully prays that a writ of certorari issue to review and reverse the opinion of the United States Court of Appeals for the Ninth Circuit, said opinion striking down contractural provisions and rights, by denying all use plaintiffs an award of attorney's fees in Miller Act cases, which opinion is in direct conflict with the Supreme Court.

OPINIONS BELOW

The amended judgment of the United States District Court (Appendix A, infra, p. 13-14) was entered on November 9, 1971 and was not published. The memorandum opinion of the United States Court of Appeals for the Ninth Circuit (Appendix B, infra, p. 15-16) was entered on July 24, 1974 and was not published.

JURISDICTION

The judgment of the Appeals Court was entered on July 24, 1974. A timely motion for rehearing was filed and was denied on October 22, 1974 (Appendix C, infra, p. 17). The jurisdiction of this Court is invoked under the Miller Act, 40 U.S.C., Section 270.

QUESTIONS PRESENTED

1. Can a federal court deny contractural rights, that are valid under state law, to

a use plaintiff under the Miller Act, 40 U.S.C., Section 270?

2. Are the contractural rights of a use plaintiff under the Miller Act, 40 U.S.C., Section 270, decided by state law?

3. Is the Miller Act, 40 U.S.C., Section 270, an absolute bar to the award of attorney's fees to a use plaintiff, whose express subcontract provides for the award of attorney's fees?

STATUTORY PROVISIONS INVOLVED

The Miller Act, 40 U.S.C., Section 270a and 270b, is set out in full in Appendix D, infra, pp. 18-21.

STATEMENT OF THE CASE

Petitioner was a subcontractor to respondent Christensen & Foster on a federal construction project located in California. Federal Insurance Company was respondent's surety required under the Miller Act. The subcontract was executed in California in

1965 and under section 15 provided for the award of "costs, penalities, damages and attorney's fees" upon legal action.

Before total completion of its sub-contract, petitioner was wrongfully terminated. Following a non-jury trial in United States District Court, petitioner was awarded judgment for labor and materials, together with costs, interest and attorney's fees. Upon appeal, the judgment was affirmed except that the award of attorney's fees was reversed, the Appeal Court ruling in pertinent part:

> Attorney's fees are not recoverable by the use plaintiff in Miller Act cases. F. D. Rich Co., Inc. v United States ex rel Industrial Lumber Co., Inc. 1974 _____U.S. _____(May 28, 1974, slip op at 9-14)

REASONS FOR GRANTING THE WRIT

Whenever they are valid under applicable state law, contractural rights to attorney's fees are enforceable in federal court. Alland v Consumers Credit (1973) 476 F. 2d

951 citing U.S. v Carter (1910) 217 U.S. 286, 30 S. Ct. 515, 54 L. Ed. 769.

It is well-recognized that attorney's fees may be awarded whenever the parties have entered into an enforceable agreement providing for same. Merola v Atlantic Richfield (1974) 493 F. 2d 292, citing Hall v Cole (1973) 412 U.S. 1, 4-5, 93 S. Ct. 1943, 36 L. Ed. 2d 702, Fleischmann Distilling v Maier Brewing (1967) 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475, Kahan v Rosentiel (3rd Cir.) 424 F. 2d 161, 165, cert. den. sub. nom. Glen Alden v Kahan (1970) 398 U.S. 950, 90 S. Ct. 1870, 26 L. Ed. 2d 290, Alland v Consumers Credit, supra.

The mere fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right arising upon a contract valid and unassilable under controlling state law, does not authorize that court to modify or ignore

the terms of the legal obligation upon the claim or because the court thinks that those terms are harsh or oppressive or unreasonable. Re Intaco Pureto Rico (1973) 357 F. Supp. 1122, citing Manufacturers v McKey (1934) 294 U.S. 442, 55 S. Ct. 444, 79 L. Ed. 982.

In construing a contractural provision for the payment of attorney's fees, the law of the state governing the contract must be looked to by federal courts. Alexander v Groves (1972) 345 F. Supp. 848, citing Re Pack-It 158 F. Supp. 148 (D.N.J. 1958), Security Mortgage v Powers (1928) 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236.

The construction of the contract for attorney's fees presents a question of local law. Re Intaco Pureto Rico, supra, citing Security Mortgage v Powers, supra.

The general rule is that a federal court will apply the law of the forum state, including that state's choise of

law rules. Alland v Consumers Credit, supra, citing Klaxon v Stentor Electric Mfg. (1941) 313 U.S. 478, 61 S. Ct. 1020, 85 L. Ed. 1477.

If federal law governs, a contractural obligation for attorney's fees becomes part of compensation "justly due" the subcontractor under the Miller Act. Travelers Ind. v U.S. ex rel Western Steel (1966 CA9 Or.) 362 F. 2d 896.

The essence of its (Miller Act) policy is to provide a surety who, by force of the Act, must make good the obligation of a defaulting contractor to his suppliers of labor and materials, including the contractural provision of attorney's fees and costs. U.S. ex rel Sherman v Carter (1962) 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776.

Thus, the United States Court of Appeals erred when it did not affirm the award of attorney's fees by appling applicable California law.

This Court, in F. D. Rich Co. v United States ex rel Industrial Lumber, 94 S. Ct. 2157, ruled that absent a contractural provision for attorney's fees, such fees could not be awarded in Miller Act cases, but the major thrust of this Court's ruling was that an award of attorney's fees under California Government Code Section 4207 was not incorporated into the Miller Act. Since in the instant case, the award of attorney's fees was provided in the subcontract, the holding in F. D. Rich Co., supra, does apply, but only under a contractural provision and not under California Government Code Section 4207.

The United States Court of Appeals incorrectly concluded from F. D. Rich Co., supra, that no use plaintiff, under any circumstances, can be awarded attorney's fees in Miller Act cases and therefore, again erred.

Section 15 of petitioner's subcontract

provides as follows:

> To indemnify and save harmless the Owner and Contractor from and against all suits, claims, actions, costs, penalties, and damages of whatsoever kind or nature, <u>including attorney's fees</u>, arising out of, in connection with, or incident to the Subcontractors performance of this subcontract. (Emphasis added)

California Civil Code Section 1717 was passed by the legislature in 1968 and reads as follows:

> In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
>
> Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provided for a waiver of attorney's fees is void.
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

California Civil Code Section 1717 changes a contract awarding attorney's fees from the party named to the prevailing party. Coast Bank v Holmes (1971) 19 C.A. 3d 581, Systems Inv. v Union Bank (1971) 21 C.A. 3d 735, San Luis Obispo Bay Properties v Pacific Gas & Electric (1972) 28 C.A. 3d 556, Babcock v Omansky (1973) 31 C.A. 3d 625, reh. den., Assoc. Convalescent Ent. v Carl Marks (1973) 33 C.A. 3d 116, reh. den., hear. Cal. S. Ct. den., Bearing v Heller (1974) 38 C.A. 3d 59, Morris v Chevrolet Motor Division (1974) 39 C.A. 3d 917.

California Civil Code Section 1717 has also been held to be retroactive. Coast Bank v Holmes, supra, San Luis Obispo Bay Properties v Pacific Gas & Electric, supra, Systems Inv. v Union Bank, supra, Babcock v Omansky, supra.

When the higest court of a state has spoken, its pronouncement is to be accepted

federal courts as defining state law, unless it has later given clear and persuasive indications that its pronouncement will be modified, limited or restricted. West v American Tel & Tel (1940) 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

Intermediate appellate opinions are controlling in the absence of contrary indications from the highest court of a state. Six Companies of California v Joint Highway District (1940) 311 U.S. 180, 61 S. Ct. 186, 186 L. Ed. 114, reh. den. 311 U.S. 730, 61 S. Ct. 438, 185 L. Ed. 475.

CONCLUSION

The United States Court of Appeals has decided a federal question in conflict with the F. D. Rich Co., supra, decision of this Court, its own prior holdings, and the Miller Act. If allowed to stand, it will

wrongfully deny contractural rights to use plaintiffs in Miller Act cases and create confusion throughout the other Circuits, ultimately requiring this Court to render a decision. This should be decided at this time to lessen the harm to the hundreds of thousands of subcontractors and contrators involved in the voluminuous federal construction projects throughout the United States. It is almost universal in the construction industry that subcontracts contain an attorney's fee provision.

The petitioner respectfully prays that this Court review and reverse the erroneous opinion of the Court of Appeals.

Respectfully submitted,

Paul Potter
P.O. Box 260
Menlo Park, California 94025

APPENDIX A

United States District Court
For The District of Northern California

No. Civ-49366

The United States of America
for the use of Paul Potter, dba
RFI Shield-Rooms,

Plaintiff
(Petitioner)

v

Christensen & Foster, a corp.,
Federal Insurance Company, a
corp.,

Defendants
(Respondents)

AMENDED JUDGMENT

Pursuant to the amended findings of fact and conclusions of law filed simultaneously herewith, this Court finds that plaintiff suffered a loss for labor, materials and supplies in the amount of $8,928.24; that plaintiff's reasonably anticipated profits were in the amount of $4,182.42.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff shall have judgment against the defendants Christensen & Foster and Federal Insurance Company, and each of them, in the amount of $13,110.66, with interest thereon as provided by law from January 4, 1966, until paid; that plaintiff shall have judgment against defendants in the amount of $4,250.00 as and for reasonable attorney's fees; that plaintiff shall have costs of suit as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, and each of them, shall take nothing by their counterclaim.

DATED this 4th day of October, 1971.

/s/Walter E. Craig
United States District Judge

Filed November 9, 1971

APPENDIX B
DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA for the use of PAUL POTTER, d/b/a R. F. I. SHIELD-ROOMS, *Plaintiff-Appellee,* vs. CHRISTENSEN & FOSTER, a corporation, FEDERAL INSURANCE COMPANY, a corporation, FIRST DOE, SECOND DOE, THIRD DOE, BLACK CORPORATION, WHITE CORPORATION, BLUE CO., a partnership, and GRAY CO., a partnership, *Defendants-Appellants.*	No. 72-1337

[July 24, 1974]

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and CARTER, Circuit Judges, and SOLOMON,* District Judge

MEMORANDUM

The principal questions presented to us in this Miller Act case are whether certain of the trial court's findings of fact are clearly erroneous. We approach these questions as we did in *Fluor Corp. v. United States ex rel Mosher Steel Co.*, 9 Cir., 1969, 405 F.2d 823, 825. We are not left with the definite and firm conviction that a mistake has been made in any of the questioned findings.

In one respect, as we have learned since this appeal was heard, the court did err. Attorney's fees are not recoverable by the use

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

plaintiff in Miller Act cases. *F. D. Rich Co., Inc. v. United States ex rel Industrial Lumber Co., Inc.*, 74, ... U.S. ... (May 28, 1974, slip op. at 9-14).

That portion of the judgment which awards attorney's fees to appellee is reversed. In all other respects the judgment is affirmed. Each party shall bear his or its own costs on appeal.

PLEASANT-WALSH PRINTING CO., SAN FRANCISCO 8-1-74—480

APPENDIX C

United States Court of Appeals
For The Ninth Circuit

No. 72-1337

The United States of America
for the use of Paul Potter, dba
RFI Shield-Rooms,

Plaintiff-Appellee
(Petitioner)

v

Christensen & Foster, a corp.,
Federal Insurance Company, a
corp.,

Defendants-Appellants
(Respondents)

Before: Duniway and Carter, Circuit Judges
and Solomon,* District Judge

ORDER

The motion for leave to file supplemental points and authorities in response to the petition for a rehearing is granted.

The petition for a rehearing is denied.

Filed October 22, 1974

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D

The Miller Act
40 U.S.C., Section 270a

(a) Before any contract, exceeding $2,000 in amount, for the construction, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or othersecurity in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

40 U.S.C., Section 270b

(a) Every person who has furnished labor

or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninty days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit to prosecute said action to final execution and judgment for the sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractural relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshall of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court

for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.